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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MICHAEL TENORIO, Defendant and Appellant.	F073932 (Super. Ct. No. BF160015A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Robert Gezi and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Raymond Tenorio was charged with first degree murder for beating Kirk Haag to death. Haag was a roommate in a residence with defendant and his family. The beating occurred after defendant confronted Haag about accusations that

Haag had touched defendant's young daughter, and Haag allegedly said that he had done so.

Defendant was convicted of the lesser included offense of voluntary manslaughter based on heat of passion. He was sentenced to the second strike term of 17 years in prison.

On appeal, defendant contends the court should have granted his motion to have the jury instructed on an excusable homicide committed by accident and misfortune, in the heat of passion and upon sufficient provocation, as provided in the second paragraph of Penal Code[1] section 195. Defendant argues the court's refusal to so instruct the jury was prejudicial because he testified that he did not intend to beat the victim, and the jury's verdict for voluntary manslaughter showed that it believed his testimony about provocation.

Defendant raises a separate instructional issue, and argues the court committed prejudicial error when it denied his motion to instruct the jury on involuntary manslaughter as another lesser included offense of first degree murder.

Defendant also challenges the trial court's finding that his prior conviction for a violation of section 245, subdivision (a)(1) was for assault with a deadly weapon, and thus a prior serious felony and a strike. Defendant argues the trial court engaged in improper factfinding when it made that determination, in violation of his Sixth Amendment right to a jury trial, and the matter must be remanded for further proceedings.

On September 28, 2018, in an unpublished opinion, we rejected defendant's contentions and affirmed the judgment.

Thereafter, defendant filed a petition for rehearing and requested remand for the superior court to exercise its discretion to strike the prior serious felony enhancement that was imposed in this case, pursuant to recent amendments to section 667, subdivision (a),

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1 All further statutory references are to the Penal Code unless otherwise indicated.

and section 1385. We subsequently vacated our opinion and granted rehearing, and the People concede that remand is required.

We remand the matter for the superior court to consider whether to strike the prior serious felony enhancement in furtherance of justice, and otherwise affirm the judgment.

FACTS

The residence

Nina Paul and her husband lived in a double-wide trailer in Lake Isabella. They slept in one of the three bedrooms. Her husband was a long-haul truck driver, and Ms. Paul often traveled with him and was away from the trailer for long periods of time.

Kirk Haag, Ms. Paul's longtime friend, had lived in the trailer with the Pauls for a couple of years. He slept in the second bedroom.

As of April 2015, the third bedroom was occupied by Nicole Tenorio, who was married to defendant. Ms. Tenorio and defendant were the parents of two young children, including C., their three-year-old daughter. Ms. Tenorio also had a teenage son. Ms. Paul allowed Ms. Tenorio and the three children to live at the trailer for a few months until Ms. Tenorio found another place to stay.

Defendant, Ms. Tenorio's husband, did not initially move into the trailer with his wife and the children. Ms. Paul testified that at some point in April 2015, she returned home after traveling with her husband and discovered that defendant had moved in with Ms. Tenorio and the children.

Stephanie Tappe and her boyfriend, Douglas Hinman, occasionally stayed at the trailer. Ms. Tappe was Ms. Paul's niece.

Ms. Tenorio's accusation against Haag

Ms. Paul testified that around April 6, 2015, she was out of town and got a phone call from Ms. Tenorio. Ms. Tenorio told her that Kirk Haag, the other roommate in the residence, might have inappropriately touched C., the three-year-old daughter of

defendant and Ms. Tenorio. Ms. Paul told Ms. Tenorio to take C. to the hospital, have her checked, and call the police if it happened.

There is no evidence that Ms. Tenorio further investigated her daughter's allegations or reported the matter to the police.

The night of the homicide

On April 24, 2015, Ms. Paul went to Simi Valley with Ms. Tappe and Hinman. Around 9:30 p.m., they returned to the trailer.

Defendant, Haag, and Ms. Tenorio's teenage son were still up. Ms. Tappe saw Ms. Tenorio and the two younger children in the bathroom. Hinman testified that Haag seemed a little intoxicated, but he did not notice anything wrong between defendant and Haag.

Ms. Paul also testified that nothing seemed wrong between defendant and Haag. Both defendant and Haag were drinking. Haag wanted to talk with Ms. Paul, but she declined because she was very tired and wanted to go to bed.

Sometime around 10:00 p.m., Ms. Paul, Ms. Tappe, and Hinman went into Ms. Paul's bedroom to sleep. Ms. Paul briefly went back into the living room to retrieve a floor heater because it was a cold night. Defendant and Haag were talking. Ms. Paul went back into her bedroom and closed the door.

Ms. Tenorio calls for help

Hinman testified he fell asleep almost immediately but woke up because someone was banging on Ms. Paul's bedroom door. Hinman testified Ms. Tenorio was shouting, " 'Nina, wake the fuck up. Wake the fuck up. He's killing him. He's killing him. Wake the fuck up.' "

Ms. Paul testified that she heard Ms. Tenorio yell, " 'He's killing him. He's killing him.' "

The scene in Haag's bedroom

Ms. Paul, Ms. Tappe, and Hinman left their bedroom and went into the hallway. Hinman testified the situation was chaotic.

Ms. Paul testified that Ms. Tenorio was yelling, upset, and got "right in my face saying that I was a liar." Ms. Paul testified that Ms. Tenorio was referring to their prior conversation about whether Haag had touched her three-year-old daughter.

Ms. Paul and Ms. Tappe went into Haag's bedroom. The door was open and Haag was lying facedown on the floor. His head was partially under the bed. Defendant was standing over Haag, with his legs on either side of Haag's body. Hinman testified that Ms. Paul was crying and yelling, " 'Stop it, stop it, stop it.' " Hinman testified that defendant said something to the effect that Haag deserved it, and that Haag was a child molester.

Hinman did not see defendant hit or kick Haag. Ms. Tappe pushed Hinman back into Ms. Paul's bedroom and he could not see what else happened.

Ms. Paul testified that after she went into Haag's bedroom, defendant kicked Haag once or twice. Ms. Tappe testified that defendant punched Haag in the face.

Ms. Paul asked defendant what happened. Defendant told Ms. Paul that "it was none of my F'ing business." Ms. Paul testified defendant also told her that "if I don't want the same thing, I better get out" of Haag's bedroom.

As Ms. Paul left Haag's bedroom, defendant kicked Haag in the ribs and Haag's body jerked. Ms. Paul testified Haag did not say anything, and he was making gurgling sounds.

911 call and defendant's escape

Ms. Tappe called 911 and handed the phone to Hinman who stayed on the line with the dispatcher and answered questions.

While Hinman was talking to the dispatcher, Ms. Tenorio yelled out to defendant, " 'Ray Ray, he's on the phone. Run. Run. Run. He's calling the cops.' "

Defendant swore and cursed at Hinman and Ms. Tappe for calling 911. Ms. Tenorio told defendant to leave, and defendant left the trailer.

Haag's condition

Around 10:45 p.m., deputies from the Kern County Sheriff's Department responded to the trailer after being dispatched to an assault in progress.

The deputies found Haag lying facedown on the bedroom floor. Haag's head was under the bed and his face was in a pool of blood. There was blood on the floor, on the bed, and splattered around the bedroom.

The deputies had to lift up the bed to pull out Haag's body. Haag's face was swollen and bleeding, and he was having trouble breathing. Haag stopped breathing before the paramedics arrived and the deputies began emergency procedures.

The paramedics were able to stabilize Haag's breathing, but he remained unconscious. The paramedics transported him to Kern Valley Hospital. A few hours later, he was moved to the trauma unit at Kern Medical Center.

Haag's fatal injuries

Haag died at the hospital five days later, on April 29, 2015.

The pathologist testified the cause of death was blunt force trauma inflicted to Haag's head and chest as a result of the beating. The blunt force trauma to the head resulted in subarachnoid hemorrhages on both sides of the brain and caused swelling in the brain.

Haag's face was quite swollen, and he had two black eyes. There were multiple bruises and lacerations on his head, cheeks, lips, and face, and a very large bruise on the left side of his face.

Haag's ribs were fractured, and the movement of the fractured ribs caused massive internal bleeding in his chest. There were also bruises on his chest, arms, and legs.

All of Haag's injuries were consistent with being inflicted by a person's hands, fists, and feet. There was no evidence that a weapon was used to inflict the injuries. The

pathologist was surprised Haag lived for several days after the infliction of these injuries and believed he must have been a "tough guy" to survive after the beating.

The initial investigation

Defendant was not at the trailer when the deputies arrived, and he was not apprehended that night.

A paramedic who treated Haag at the trailer testified that when the emergency personnel arrived on the night of the assault, a man and two women were standing outside the trailer. In contrast to other trauma calls, the paramedic noticed that no one was yelling or screaming for them to hurry up and help; the residents were just standing there.

Deputy Plaza testified that when he initially arrived at the trailer, the residents were waiting outside. A female told him, " 'They were fighting,' " and directed him inside the trailer. Another resident said, " 'He left. He ran.' "

Once the paramedics transported Haag from the trailer, the deputies began to investigate the incident. They placed Ms. Tenorio and her three children in a squad car to keep them away from the other residents.

Hinman told a deputy that he woke up because a woman was yelling for Ms. Paul to answer the door. Hinman said the woman yelled, " 'Ray Ray is kicking his ass.' "

Ms. Paul reported that about a week before the assault, Ms. Tenorio told her that Haag had touched C., Ms. Tenorio's three-year-old daughter. Ms. Paul said that on the night of the assault, Ms. Tenorio yelled at them to open the bedroom door. When Ms. Paul came out of the bedroom, Ms. Tenorio confronted her again about Haag molesting her daughter.

Defendant's postarrest statements

An arrest warrant was issued for defendant based on a charge of attempted murder. At 7:30 p.m. on April 29, 2015, the police in Oxnard arrested defendant on the

outstanding warrant. Defendant was inspected for injuries and he had a mark on one knuckle.

Defendant was transported back to Kern County and interviewed later on the night of April 29, 2015. He was advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and agreed to answer questions.

Defendant said he did not know Haag until he moved into the trailer with Ms. Tenorio and the children. Defendant said C., his daughter, told him that Haag " 'touched me right here,' and showed me … her private parts." His daughter made this statement a couple of weeks before defendant beat Haag. C. may have said it again on the day of the beating.[2]

Defendant said that after his daughter made a second accusation against Haag, defendant and Ms. Tenorio "asked him about it and he said nothing happened." Haag said he did not know what the kid was talking about, and "he'd just go lock himself back in the room." Defendant said he did not do anything about it. Defendant said just before the assault, he drank one beer and Haag was drinking vodka.

DEFENDANT'S TRIAL TESTIMONY

Defendant testified at trial that he had a prior felony conviction for moral turpitude in 2009. As of 2013, defendant and Ms. Tenorio were separated. In 2014, defendant was in state prison.

In February 2015, defendant was out of custody. Ms. Tenorio sent him a text message that she was living in Lake Isabella with the children and invited him to join them. Ms. Tenorio picked him up in Oxnard. Defendant, Ms. Tenorio, and the children initially slept in Ms. Paul's bedroom because she was gone. Defendant did not know the

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[2] When defendant was interviewed, the deputies were aware that Haag had died at the hospital a few hours earlier. Midway through the interview, defendant asked what he was being charged with. He was informed that the arrest warrant was issued for attempted murder. The deputies did not tell defendant that Haag had died.

other people who lived at the trailer when he moved in. The family eventually moved into the other bedroom when Ms. Paul returned.

The child's first accusation

Defendant testified that in mid-April 2015, he was sitting in the trailer with Ms. Tenorio and Haag. Defendant's daughter pointed to Haag and said, "He's touching me." Defendant took the child's statement literally and told her that Haag was not sitting with her on the couch and not touching her. The child again said, "he's touching me," and then, "He's touching me here," and pointed to her vagina.

Defendant asked Haag if that was true. Haag said "no," and went into his bedroom and shut the door.[3]

Defendant testified he believed his daughter, but he did not report her initial claim to the police because he had been molested as a child: "And it was my experience the person who molested me threatened to kill my whole family if I ever told anyone, and that he would keep me forever and I would be his."

Defendant testified he talked to Ms. Tenorio about their daughter's accusation, and they decided to find another place to live. Defendant testified he kept a close eye on his

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[3] Prior to trial, the defense moved to introduce evidence that defendant knew Haag had a prior conviction for committing a lewd or lascivious act on a child under the age of 14 years in violation of section 288, subdivision (a), and he was required to register as a sex offender pursuant to section 290. The prosecutor replied that if the defense introduced evidence of the victim's character for violence, then the People would move to introduce defendant's prior acts of violence pursuant to Evidence Code section 1103, including the facts of his conviction for assault with a deadly weapon.

The court held the People could not introduce evidence about Haag's prior conviction and registration in the case-in-chief. If defendant testified, he could only be impeached with a sanitized version of his prior felony conviction for moral turpitude. The court further held that if defendant introduced evidence about the victim's prior conviction and registration, that would trigger Evidence Code section 1103, and the People could impeach defendant with an unsanitized version of his prior conviction for assault with a deadly weapon.

Defendant did not introduce evidence about the victim's prior conviction or his registration status, and defendant was only impeached with a sanitized version of his prior conviction.

children, took them camping so they were away from the trailer for a while, and tried to find a new place to live but they had nowhere else to go.

On cross-examination, defendant admitted that his daughter never said Haag had threatened her. He did not take his daughter to the doctor to check her physical condition.

Defendant also admitted that during his postarrest interview, he was asked if he did anything when he first heard his daughter's accusation against Haag, and he replied: "Nothing. I didn't do a damn thing about it." At trial, defendant admitted he did not tell the deputies during the interview that he talked with Ms. Tenorio about finding another place to live, or that he took the family camping to stay away from Haag.

The night of the assault

Defendant testified the family continued to live at the trailer with Haag. Defendant believed his daughter's accusation against Haag but he "didn't know for sure if he did or not." Defendant testified: "It was always in my mind" and made him angry that Haag had done something horrible to his daughter.

Defendant testified that on the night of the assault, his daughter said goodnight to him and added, "Kirk touched me." Defendant said that Haag "couldn't be touching her, that he was on the other side of the room." The girl grabbed "her privates" and said " 'right here.' "

Defendant believed his daughter and felt hurt and angry. Haag walked away and said under his breath, "that damn that little girl."

Ms. Tenorio took the children to bed and defendant stayed up to watch television with Ms. Tenorio's teenage son. Defendant did not take the family away from the trailer that night because it was late and they had nowhere to go. Defendant had consumed one beer earlier in the day. Haag watched television and was drinking, but defendant did not talk to him.

Defendant testified that Ms. Paul returned to the trailer with her friends later in the evening, and they went to bed.

Defendant stayed in the living room. Haag went into his bedroom. Defendant testified he "heard a loud thump" from Haag's bedroom, "and I walked in to see what was going on." Ms. Tenorio also went into Haag's bedroom. Haag was lying facedown on the floor and said that he fell. Defendant helped him up and Haag said he was all right. Haag appeared fine, and defendant and Ms. Tenorio left the bedroom. Haag stayed in his bedroom and closed the door.

Defendant confronts Haag

Defendant went back into the living room and watched television. Defendant admitted that the thought "might have" passed through his head about what Haag may have done to his daughter. After about a half-hour, defendant went to Haag's bedroom to ask him about his daughter's accusation.

Defendant testified he opened Haag's bedroom door and Haag was standing by the bed. Defendant asked Haag if his daughter's accusation was true because it was the second time she said it. Haag replied, " '[W]hat do you expect? I'm a child molester. That's what I do.' "[4]

Defendant testified he felt angry when he heard Haag's reply. Defendant used his fists and punched Haag in the face or head multiple times. After several punches, Haag fell down and defendant kicked and "stomped him on his back."

Defendant admitted that he inflicted all the physical injuries on Haag described by the pathologist.

"Q. … And while you're doing this, you're angry, correct?

"A. Correct.

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[4] Defendant admitted that during his postarrest interview, he told the deputies that everything happened quickly and he did not really remember what happened in Haag's bedroom. Defendant did not disclose that he confronted Haag about the molestation, or that Haag replied that he was a child molester.

"Q. Okay. [¶] You're angry at [Haag] for what he had done?

"A. Correct."

Haag did not fight back or hit defendant in any way.

Defendant testified he was not thinking or feeling anything, and he "blacked out." "[A]fter the first punch or couple of punches … everything just went black. …. Everything is just a blur." Defendant did not have an independent recollection of exactly where he kicked Haag, he did not know if there was blood on his face, and he was "just kind of … in and out" while he was punching and kicking Haag. Defendant testified that "everything just happened so fast … I remember punching him, and I don't remember anything for a minute. And I remember Nina [Paul] coming in. Everything just came and went."

Defendant testified he regained his recollection when Ms. Paul arrived in Haag's bedroom. Ms. Paul yelled at him to stop. Defendant said it was none of her business. He also yelled that Haag deserved it because he was a child molester. Defendant made that statement because Haag "had just got done telling me that he molested my daughter. I believe he deserved to get his ass kicked."

Defendant remembered that he left Haag's bedroom, went to Ms. Paul's room, and saw Hinman on the telephone. Defendant cussed out Hinman for calling the police.

Defendant never heard Ms. Tenorio tell him to leave the trailer. He left the scene because he was "traumatized" by what happened, and he did not feel like getting arrested.

Defendant testified he walked away from the trailer and left his wife and children behind. He did not know Haag's condition when he left. He briefly stayed at a friend's house, and he somehow ended up in Oxnard but did not know how he got there. He had enough money to buy liquor, and he also panhandled. He stayed around the rescue mission, he kept drinking, and he stayed drunk for several days. He did not contact his wife to find out how the family was doing.

On April 28, 2015, defendant walked to a liquor store in Oxnard. A police officer saw him walk outside the crosswalk and approached him. The officer asked defendant if

he was on parole or probation, and defendant said no. The officer asked to search defendant, and defendant said no. The officer asked for his name, and defendant identified himself. The officer left. The next day, defendant was sitting at the train station when officers from the Oxnard Police Department arrived and arrested him.

Defendant testified that he did not want to be convicted of any crime or face punishment in this case because he did not want to be taken away from his children.

Cross-examination about intent

On direct examination, defendant testified he was not trying to kill Haag when he was beating him.

On cross-examination, the prosecutor asked defendant about his intent as he punched and kicked Haag.[5]

> "Q. [W]hen you're hitting him, what are you intending to do at that point in time?
>
> "A. Hit him.
>
> "Q. … [W]hen you hit him, are you just trying to smack him around a little bit?
>
> "A. I couldn't say.
>
> "Q. Okay. When you hit him, were you hitting him as hard as you could?
>
> "A. I was hitting him pretty hard, yes.
>
> "Q. You say pretty hard. What does that mean?
>
> "A. Hitting him pretty hard.
>
> "Q. … As hard as you could?
>
> "A. I don't know if it would be as hard as I could.

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[5] As we will explain in issues I and II, defendant contends the court should have granted his motions to instruct the jury about excusable homicide and involuntary manslaughter. Defendant's testimony about how he beat Haag supports the court's denial of his instructional motions.

"Q. … Are you putting weight behind it? Do you know what I mean by that?

"A. Fair to say, yeah.

"Q. … So you were putting weight. You were stepping into it when you would hit him?

"A. The first couple of punches that I recall, yes.

"Q. Because you're trying to hit him with as much as force as you can, correct?

"A. Yes.

"Q. So you want to use more than just your arm muscle. You want to use your hit and step into it to bring that power, correct?

"A. Yes.

"Q. … How about when you're kicking him, is it just a tap?

"A. No.

"Q. … When you're stomping him, how far up are you bringing your foot before you press it down?

"A. Well, he's a pretty big guy, so there wasn't much room in between me lifting my foot as far up as I could and his stomach.

"Q. … You told us, though, that you're responsible for breaking the ribs in the back, right? On his back.

"A. Yes.

"Q. … How did you get the power to do that? What did you do, as far as you can remember, because you told us you remember stomping him, how are you getting power to hit those ribs hard?

"A. Anger.

"Q. Okay.

"A. I can't—I can't tell you.…

"Q. That's the emotion you were feeling. [¶] What I'm asking is in terms of technique. [¶] You told us before when you were punching him, you wanted to bring more than just your arm muscle. You're stepping into

it. You wanted to bring some power. [¶] Would you agree with me it's not easy to break ribs?

"A. I don't know. I've never tried before.

"Q. … But to break bone you needed some power behind it, right?

"A. I assume, yeah.

"Q. You can't just tap him and his ribs are going to break, correct?

"A. Correct.

"Q. So my question is how are you getting power when you're stomping him?

"A. Lifting my food and—

"Q. … Are you shifting your weight and then bringing it all down so that when you make impact, the weight is in your kicking foot?

"A. I couldn't say. I don't really remember that much detail about it."

Also on cross-examination, defendant testified about his feelings and beliefs at the time of the assault:

"Q. [Y]ou said that [Haag] did deserve what you gave to him, correct?

"A. I believed he deserved me kicking his ass.

"Q. That's what you think now, correct?

"A. I believed it at the time.

[¶] … [¶]

"Q. He deserved what he got, correct?

"A. He didn't deserve to die. He deserved to get his ass kicked, yes.

"Q. … When you're doing it, he deserved it, correct?

"A. Yeah.

"Q. He deserved every punch you gave him, correct?

"A. Yeah.

"Q. He deserved every blow that you gave him that broke his ribs, correct?

"A. Yeah."

JURY INSTRUCTIONS

Defendant was tried for the first degree murder of Haag.

The court instructed the jury on first degree murder, express and implied malice, provocation that reduces first degree murder to second degree murder or to manslaughter, and second degree murder as a lesser included offense. (CALCRIM Nos. 520, 521, 522.)

The court instructed the jury on voluntary manslaughter based on heat of passion and provocation, as a lesser included offense of murder. (CALCRIM No. 570.)

In CALCRIM No. 500, the jury was instructed on the general principles of homicide, that defendant was charged with murder, and manslaughter was a lesser included offense. The instruction further stated that a homicide could be lawful if a person killed with a legally valid excuse or justification. The jury was not instructed on any justifiable or excusable homicides.

The court denied the following instructions that were requested by the defense.

CALCRIM No. 505

Defense counsel requested CALCRIM No. 505, justifiable homicide based on self-defense or defense of others, and argued defendant acted to defend his daughter and his family against Haag, who lived in an adjacent bedroom. The prosecutor replied there was no evidence that defendant had to defend his daughter or anyone else when he beat Haag.

The court denied defendant's request and found there was no evidence of an imminent danger to defendant or the child at the time of the homicide.

CALCRIM No. 510

Defense counsel requested CALCRIM No. 510, excusable homicide based on accident. Counsel argued that defendant's testimony supported the instruction because he did not intend to kill Haag, he threw some punches and kicked him, he did not think he deserved to die, and defendant acted "with usual and ordinary caution." The prosecutor replied there was no evidence of accident or mistake, and the pathologist testified the victim died from a severe beating.

The court denied CALCRIM No. 510 because there was no evidence the defendant killed Haag while "doing a lawful act in a lawful way."

CALCRIM No. 511

Based on the same arguments in support of CALCRIM No. 510, defense counsel also requested the pattern instruction for CALCRIM No. 511, that he was not guilty because he committed an excusable homicide and killed Haag by accident while acting in the heat of passion.[6]

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[6] Defendant requested the following pattern version of CALCRIM No. 511:

"The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing:

"1. The defendant acted in the heat of passion;

"2. The defendant was (suddenly provoked by _____ /[or] suddenly drawn into combat by _____);

"3. The defendant did not take undue advantage of _____ ;

"4. The defendant did not use a dangerous weapon;

"5. The defendant did not kill _____ in a cruel or unusual way;

"6. The defendant did not intend to kill _____ and did not act with conscious disregard of the danger to human life; [¶] AND

"7. The defendant did not act with criminal negligence.

"A person acts in the heat of passion when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote

Defense counsel argued the instruction was supported by the evidence because defendant "was suddenly provoked" and "did not take undue advantage" of Haag, since he used his hands and feet instead of a weapon.

> "[W]hat happened was not done in a cruel or unusual way. It was a fight that occurred between the two men. [¶] Perhaps with [defendant] being the winner of the fight, but still a fight, nonetheless, and again, as was demonstrated by [defendant's] testimony, [defendant] did not intend to kill Mr. Haag, and he did not act with a conscious disregard of the danger to human life. He was simply in a fight or assaulted Mr. Haag. [¶] And it's the defense position that [defendant] did not act with criminal negligence with regard to what his actions were at that time, and so I do think that there is a basis to give CALCRIM 511."

> provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.
>
> "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.
>
> [¶] … [¶]
>
> "Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:
>
> "1. He or she acts in a way that creates a high risk of death or great bodily injury; [¶] AND
>
> "2. A reasonable person would have known that acting in that way would create such a risk.
>
> "In other words, a person acts with criminal negligence when the way he or she acts is so different form how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.
>
> "The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/[or] manslaughter)."

The prosecutor replied there was no evidence of a fight between defendant and Haag. Defendant was not injured, and he admitted Haag never swung at him or landed a punch. The prosecutor argued that defendant took advantage of Haag, based on the testimony from the occupants of the trailer that he continued to punch and kick Haag while he was unconscious and lying on the floor.

The court's ruling

The court denied the defense request for CALCRIM No. 511 because there was "no evidence supporting this defense. Evidence was presented that the killing was done with criminal intent and not accidentally."[7]

CALCRIM No. 571

Defense counsel next requested CALCRIM No. 571, voluntary manslaughter based on imperfect self-defense, based on defendant's belief that he had to defend his daughter and family from Haag.

The court had already decided to give CALCRIM No. 525, voluntary manslaughter based on heat of passion. It denied defendant's motion for an instruction based on voluntary manslaughter/imperfect self-defense because defendant admitted there was no threat to anyone at the time of the killing.

CALCRIM No. 580

Finally, defense counsel asked for the pattern instruction of CALCRIM No. 580, involuntary manslaughter, as a lesser included offense of murder.[8]

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[7] In issue I, we will address defendant's contention that the court erroneously denied his request for CALCRIM No. 511, excusable homicide committed by accident and misfortune, in the heat of passion upon sufficient provocation.

[8] Defendant requested the following pattern instruction of CALCRIM No. 580:

> "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.
>
> "The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his

or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

"The defendant committed involuntary manslaughter if:

"1. The defendant (committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed/ [or] committed a lawful act, but acted with criminal negligence); [¶] AND

"2. The defendant's acts unlawfully caused the death of another person.

"[The People allege that the defendant committed the following crime[s]:_____ .

"Instruction [s]__tell[s] you what the People must prove in order to prove that the defendant committed _____ .]

"[The People [also] allege that the defendant committed the following lawful act[s] with criminal negligence:_____ .]

"[Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

"1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND

"2. A reasonable person would have known that acting in that way would create such a risk.

"In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

"[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

"[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a

Defense counsel argued the evidence supported the elements for involuntary manslaughter and the jury should have the option to find him guilty of this lesser offense.

The court's ruling

The court denied defendant's motion for an instruction on involuntary manslaughter because it was inapplicable based on defendant's trial testimony: "Here we have a full knowledge that the punches and kicks are being delivered to the victim, and endangered his life, and nonetheless disregarded the risk by continuing to punch and kick the victim to death, as stated by the coroner."[9]

Verdict and posttrial motions

The jury found defendant not guilty of murder, and guilty instead of the lesser included offense of voluntary manslaughter based on heat of passion (§ 192, subd. (a)).

The court found the prior conviction allegations true—that he had one prior strike conviction (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(e)), one prior serious felony

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trivial or remote factor. However, it does not need to be the only factor that causes the death.]

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence):_____ . You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]

"In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter."

9 In issue II, we will address defendant's argument that the court should have given CALCRIM No. 580 because involuntary manslaughter was a lesser included offense of murder.

conviction (§ 667, subd. (a)), and two prior prison term enhancements based on convictions in 2009 and 2013 in Ventura County (§ 667.5, subd. (b)).[10]

Defendant filed postverdict motions for the court to dismiss the prior strike conviction; and to impose the midterm and strike the two prior prison term enhancements in the interest of justice.

Defendant also filed a motion for the court to strike the prior prison term enhancement based on his 2013 felony conviction, because it had been reduced to a misdemeanor pursuant to Proposition 47.

Sentencing

On June 14, 2016, the court denied defendant's request to dismiss the prior strike conviction.

The court granted defendant's motion to dismiss the prior prison term enhancement based on his 2013 conviction in Ventura County, since his felony conviction had been reduced to a misdemeanor under Proposition 47.

Defendant was sentenced to 17 years based on the midterm of six years for voluntary manslaughter, doubled to 12 years as the second strike term; plus five years for the prior serious felony enhancement. The court ordered the prior prison term enhancement based on the 2009 conviction stricken.

ISSUES

I. Denial of defendant's motion for an excusable homicide instruction

II. Denial of defendant's motion for an involuntary manslaughter instruction

III. Cumulative error

IV. The court's findings on the prior strike conviction

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[10] In issue IV, we will address defendant's contentions that he did not validly waive his right to a jury trial on the truth of the prior strike conviction, and there is insufficient evidence to support the court's finding on that allegation.

DISCUSSION

I. The court properly denied defendant's request for an excusable homicide instruction

Defendant contends the court committed reversible error when it denied his request for an instruction on excusable homicide committed by accident and mistake in the heat of passion, based on the second paragraph of section 195, CALCRIM No. 511, and *People v. Hampton* (1929) 96 Cal.App. 157 (*Hampton*).

Defendant argues the instruction was supported by his trial testimony that he did not intend to kill Haag, and he was provoked by Haag's admission that he had molested his daughter. Defendant further argues the error was prejudicial because the jury found him guilty of voluntary manslaughter based on heat of passion, and it could have reached a more favorable ruling if it had been instructed on excusable homicide.

We will find the trial court properly denied this instruction because it was not supported by substantial evidence.

A. Substantial evidence to give an instruction

"[A] trial court needs to give only those requested instructions that are supported by substantial evidence. [Citation.] In deciding whether defendant was entitled to the instructions urged, we take the proffered evidence as true, 'regardless of whether it was of a character to inspire belief. [Citations.]' [Citation.] ' "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." [Citations.]' [Citation.] Even so, the test is not whether *any* evidence is presented, no matter how weak. Instead, the jury must be instructed when there is evidence that 'deserve[s] consideration by the jury, i.e., "evidence from which a jury composed of reasonable [people] could have concluded" ' that the specific facts supporting the instruction existed." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.) The court need not give instructions based solely on conjecture and speculation. (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

The court's failure to give a requested instruction is subject to de novo review. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

B. Murder and manslaughter

Defendant was tried for first degree murder. "Murder is the unlawful killing of a human being … with malice aforethought." (§ 187, subd. (a).) A murder committed with premeditation and deliberation is first degree murder; all other kinds of murder are of the second degree. (§ 189.)

"Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (*People v. Knoller* (2007) 41 Cal.4th 139, 151; *People v. Elmore* (2014) 59 Cal.4th 121, 133 (*Elmore*).)

Malice may be express or implied. (*People v. Swain* (1996) 12 Cal.4th 593, 601.) Express malice exists "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) "Malice is implied . . . when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*).)

Voluntary manslaughter is considered a lesser included offense of murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter. [Citation.]" (*People v. Bryant* (2013) 56 Cal.4th 959, 968 (*Bryant*).) "Malice is presumptively absent when the defendant acts upon *a sudden quarrel or heat of passion on sufficient provocation* [citation], or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense.

[Citation.] Only these circumstances negate malice when a defendant intends to kill. [Citation.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59, italics added.)

"[T]he offenses that constitute voluntary manslaughter—a killing upon a sudden quarrel or heat of passion [citation], [or] a killing in unreasonable self-defense [citation] … are united by the principle that when a defendant acts with an intent to kill or a conscious disregard for life (i.e., the mental state ordinarily sufficient to constitute malice aforethought), other circumstances relating to the defendant's mental state may preclude the jury from finding that the defendant acted with malice aforethought. But in all of these circumstances, a defendant convicted of voluntary manslaughter has acted either with an intent to kill or with conscious disregard for life." (*Bryant, supra,* 56 Cal.4th 969–970.)

As explained above, defendant was charged with first degree murder, and the court instructed on second degree murder and voluntary manslaughter as lesser included offenses.

C. <u>Excusable homicide</u>

"Homicide, the killing of one human being by another, is not always criminal. In certain circumstances, a killing may be excusable or justifiable." (*Elmore, supra,* 59 Cal.4th at p. 132.)

"In general, in every crime there must exist a union or joint operation of act or conduct and criminal intent or criminal negligence. (Pen. Code, § 20.) As a further general proposition of criminal law, persons who commit an act through misfortune or by accident with no evil design, intention, or culpable negligence are not criminally responsible for the act. (Pen. Code, § 26, subd. Five.)" (*People v. Guinn* (1983) 149 Cal.App.3d Supp. 1, 9.)

Section 195 defines the circumstances where a homicide is excusable based upon "accident and misfortune."

"Homicide is excusable in the following cases:

> "1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
>
> "2. *When committed by accident and misfortune, in the heat of passion*, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner." (Italics added.)

Defendant's instructional request in this case was based on the second paragraph of section 195, that the homicide of Haag was excusable because it was committed by accident and misfortune in the heat of passion upon sufficient provocation.

"Generally, the claim that a homicide was committed through misfortune or by accident 'amounts to a claim that the defendant acted *without forming the mental state necessary to make his or her actions a crime.*' " (*People v. Jennings* (2010) 50 Cal.4th 616, 674, italics added (*Jennings*).)[11] "[I]f A, in the heat of passion and with sufficient provocation, strikes B with his fist after a sudden quarrel, *with no intent to kill or injure B*, and B dies as a result of the blow, the homicide is excusable under Penal Code section 195." (*People v. Mayes* (1968) 262 Cal.App.2d 195, 197, italics added.)

" 'When a defense is one that negates proof of an element of the charged offense, the defendant need only raise a reasonable doubt of the existence of that fact.' [Citations.] The claim that a homicide was 'committed by accident and misfortune' (§ 195), is such a defense because it 'amounts to a claim that the defendant acted *without forming the mental state necessary to make his or her actions a crime*.' " (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370, italics added (*Bohana*).)

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11 Defendant asserts this language from *Jennings* is inapplicable to his case because *Jennings* addressed excusable homicide based on doing "any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent," as set forth in paragraph 1 of section 195. However, *Jennings* addressed the prefatory language contained in both paragraphs 1 and 2 of section 195—that a homicide is excusable if "committed by accident and misfortune…" (*Jennings, supra,* 50 Cal.4th at p. 674.)

D. *Hampton*

In *Hampton, supra,* 96 Cal.App. 157, the defendant knocked down the victim in a pool hall fight. The victim got up, advanced, and hit defendant. Defendant punched back and knocked the victim out the door. The victim landed on his head and died. (*Id.* at p. 158.) The trial court denied the defendant's request for an instruction on excusable homicide " '[w]hen committed by accident and misfortune in the heat of passion' " (*Id.* at p. 159.) However, the court instructed the jury that " 'when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.' " (*Ibid.*)

Hampton reversed defendant's conviction for manslaughter because the court's instruction "was the direct contrary to that part of the law contained in section 195 of the Penal Code, in that by such statute 'homicide is *excusable* . . . when committed . . . in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken,' etc." (*Hampton, supra,* 96 Cal.App. at pp. 159–160.) "Considering the evidence in the case, it is apparent that to instruct the jury that if the homicide in question was committed 'in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation,' merely had the effect of *reducing the crime to that of manslaughter,* to all intents and purposes was a direction to the jury to find the defendant guilty of that crime." (*Id.* at p. 160.) *Hampton* concluded that the circumstances surrounding the homicide warranted an instruction on excusable homicide as defined in section 195, and that the trial court had erred by refusing such an instruction. (*Hampton,* at p. 160.)

E. Analysis

Defendant relies on *Hampton* and contends the court should have granted his motion to instruct the jury with CALCRIM No. 511, excusable homicide resulting from accident and misfortune, based on the second paragraph of section 195 about heat of passion and provocation. Defendant argues the requested instruction was supported by substantial evidence, namely his trial testimony about provocation—that when he went into the bedroom and confronted Haag about his daughter's accusation, Haag responded: " '[W]hat do you expect? I'm a child molester. That's what I do.' " Defendant asserts that Haag's death was "the unintended result of a fight" between defendant and Haag, and points to his testimony that he did not intend to kill Haag, he blacked out and could not remember the details of what happened in Haag's bedroom, and that Haag did not deserve to die, as providing substantial evidence in support of the excusable homicide instruction.

Defendant's arguments focus on the trial evidence about provocation and heat of passion. Indeed, such evidence supported the court's decision to instruct the jury on voluntary manslaughter as the lesser included offense of murder, and defendant was convicted of the lesser offense.

However, an instruction based on the second paragraph of section 195 also must be based on substantial evidence of "accident and misfortune." (§ 195, 2d par.) As noted by the trial court, there was no substantial evidence of accident and misfortune to support an instruction on excusable homicide.

Defendant was the only witness to what happened in Haag's bedroom, until just before the other residents of the trailer rushed into the bedroom and called 911. Thus, there was no conflicting evidence about defendant's conduct up to that point. While defendant made broad declarations at trial that he did not intend to kill Haag and he did not remember what happened, he ultimately admitted exactly what happened in the bedroom.

Defendant testified that he intended to hit Haag and believed Haag "deserved to get his ass kicked." While defendant insisted he did not intend to kill Haag, he testified that he repeatedly punched Haag in the face and head multiple times.

Defendant argues a reasonable juror could have found the death occurred accidentally during a fight between two men. There is no evidence to support that assertion, since defendant testified without contradiction that Haag did not start the fight, throw any blows, or fight back to prolong the assault, and defendant's multiple and repeated blows to Haag's head and body were not accidental.

Defendant further argues the excusable homicide instruction should have been given because he did not take "undue advantage" of Haag and the killing was not done in a "cruel or unusual manner." However, defendant testified that he kept beating Haag, and kicked and "stomped" him after he fell to the floor.

Defendant further admitted he intended to punch and kick Haag with as much force as he could, he stepped into his blows and put his weight behind them, and he punched and kicked Haag "pretty hard."

The other residents of the trailer filled in additional details. After Ms. Tenorio yelled at Ms. Paul for help, the witnesses went into Haag's bedroom and found Haag lying on the floor. Defendant stood on top of Haag and kicked and punched him. Ms. Paul pleaded with him to stop, but defendant replied that Haag deserved it because he was a child molester and told Ms. Paul to mind her own business or she would get the same thing. As defendant delivered these final blows, Haag was lying facedown, his head was partially under the bed and in a pool of blood, and he was making gurgling sounds. Defendant only stopped beating Haag when his wife shouted at him to flee, because they realized Hinman was talking to the 911 dispatcher.

Defendant testified Haag was not injured when he initially confronted him in the bedroom. Defendant also testified he inflicted the entirety of Haag's injuries described by the pathologist. The pathologist testified that Haag's face had multiple bruises and

lacerations, his face was "quite" swollen, and he had two black eyes. There were bruises on his chest, arms, and legs. The fatal injuries consisted of subarachnoid hemorrhages in the brain which led to a swollen brain; and fractured ribs which moved and triggered internal bleeding in the chest. Haag stopped breathing when he was initially treated at the scene, he was revived by the emergency personnel, and the pathologist was surprised that Haag survived for several days after the infliction of these severe injuries.

Based on defendant's own testimony, there was no evidence to support an instruction based on the second paragraph of section 195, that the homicide was excusable because it resulted from accident and misfortune in the heat of passion.[12] While defendant may have been acting in the heat of passion, he admitted that he intentionally and repeatedly hit and kicked Haag's head and body. There is undisputed evidence that defendant continued to beat Haag after he was lying on the floor and was unresponsive, and he inflicted multiple blows with so much force that he fractured Haag's ribs and caused the fatal injuries of internal bleeding in his head and chest.

The trial court properly denied defendant's request for an instruction based on the second paragraph of section 195. There was no substantial evidence that defendant committed the homicide by accident or misfortune, by repeatedly beating and kicking Haag's head, chest, and entire body with such force that he inflicted the grievous injuries that resulted in his death, and ignored Ms. Paul's entreaties to stop. (See *People v. Waidla* (2000) 22 Cal.4th 690, 740, fn. 17; *Bohana, supra,* 84 Cal.App.4th at pp. 370–371.)

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12 Defendant asserts the People's similar summary of the trial evidence is set forth in the light most favorable to the prosecution, emphasizes the severity of Haag's injuries, and erroneously misses the point about whether the excusable homicide instruction was supported by substantial evidence. As explained above, however, defendant's testimony was the only evidence about exactly what happened in Haag's bedroom, defendant admitted he inflicted all of the injuries described by the pathologist, and the excusable homicide instruction was not supported by substantial evidence.

F. Prejudice

Even if the court should have given the requested instruction, any error was harmless under any standard of review. There was overwhelming and undisputed evidence that the homicide was not the result of accident or misfortune. Defendant did not deliver a few blows that accidentally resulted in Haag's death. Instead, defendant intentionally beat Haag by punching and kicking him in the head and chest with his full weight.

Defendant argues the failure to instruct on excusable homicide was prejudicial because the jury found him not guilty of murder, and guilty instead of voluntary manslaughter based on heat of passion. Such a verdict indicated that the jury found defendant intended to kill Haag, but malice was negated by heat of passion and provocation. It is not reasonably probable that the jury would have found the homicide was accidental and thus excusable if the court had given the requested instruction. (*Breverman, supra,* 19 Cal.4th at p. 165.)[13]

II. The court's denial of the involuntary manslaughter instruction

Defendant argues the court committed reversible error when it denied his motion to instruct the jury on involuntary manslaughter as another lesser included offense of the charged crime of first degree murder. Defendant argues the instruction was supported by substantial evidence the homicide occurred during an assaultive crime, he testified that he did not intend to kill Haag, and he did not act with malice or conscious disregard for life.

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13 Defendant also contends that certain language in CALCRIM No. 511, the pattern instruction on excusable homicide based on heat of passion, was erroneous and may have confused the court when it denied his motion. We note that defendant requested the pattern instruction cited above and did not ask the court to modify it in any way. In any event, the court never gave the instruction, and it did not rely on the language that defendant now claims was erroneous when it denied defendant's instructional request. Instead, the court denied defendant's request for an excusable homicide instruction because it found no evidence the killing resulted from an accident as required by the second paragraph of section 195.

A. Lesser included instructions

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.) We again apply the de novo standard to review the court's failure to instruct on a lesser included offense. (*People v. Waidla, supra*, 22 Cal.4th at p. 733.)

B. Murder and involuntary manslaughter

As explained above, defendant was charged with murder, an unlawful killing committed with malice aforethought. (§ 187.)

"Involuntary manslaughter is 'the unlawful killing of a human being without malice aforethought and without an intent to kill.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 884 (*Rogers*).)

"One commits involuntary manslaughter either by committing 'an unlawful act, *not amounting to a felony*' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).)" (*Cook, supra*, 39 Cal.4th at p. 596, italics added.) Involuntary manslaughter may also occur when a noninherently dangerous felony is committed without due caution and circumspection. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006–1007 (*Butler*).)

"The performance of an act with criminal negligence supplies the criminal intent for involuntary manslaughter, regardless whether the conduct underlying the offense is a misdemeanor, a lawful act, or a noninherently dangerous felony. That is, when a defendant commits a misdemeanor in a manner dangerous to life, the defendant's conduct 'qualifies as gross negligence,' and culpability for involuntary manslaughter is warranted because the defendant has performed an act ' "under such circumstances as to supply the intent to do wrong and inflict some bodily injury." ' [Citations.] Similarly, when a defendant commits a lawful act or a noninherently dangerous felony with criminal negligence, the defendant is presumed to have had an awareness of, and conscious

indifference to, the risk to life, regardless of the defendant's actual belief." (*Butler, supra,* 187 Cal.App.4th at p. 1008.)

An instruction on involuntary manslaughter as a lesser included offense of murder is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill. (*Rogers, supra*, 39 Cal.4th at p. 884; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Breverman, supra,* 19 Cal.4th at p. 162.)

In *Cook, supra,* 39 Cal.4th 566, the undisputed evidence showed the defendant severely beat the victim, Sadler. An eyewitness saw the defendant fighting with the victim. The victim fell to the ground, and defendant continued to beat him with a stick. The witness convinced the defendant to leave the scene and get into her car. As the witness drove away, the defendant jumped out of the car and ran back to the victim and continued to beat him. The victim's head was severely battered, and bloodstained and broken pieces of board were found near the body. (*Id.* at p. 574.) The victim died as a result of aspirating blood into his lungs from extensive head and face injuries, including broken facial bones and ruptured eyeballs, and the injuries were consistent with a severe beating. Defendant was convicted of murder. (*Id.* at p. 575.)

Cook rejected defendant's argument that the court had a sua sponte duty to instruct the jury on involuntary manslaughter as a lesser included offense of the murder of Sadler. (*Cook, supra,* 39 Cal.4th at p. 596.)[14]

> "[B]ecause the evidence conclusively showed that defendant brutally beat Sadler with a board, the jury could not have found that defendant committed a mere misdemeanor battery by administering that beating. Nor was there any evidence that defendant lawfully attacked Sadler and

[14] In *Cook*, the trial court instructed the jury on involuntary manslaughter as lesser included offenses for the homicides of two other victims in separate incidents, but not for Sadler's death. (*Cook, supra,* 39 Cal.4th at p. 596.)

> continued to beat his head with a board, unaware that Sadler could die from the beating. Defendant did not simply start a fistfight in which an unlucky blow resulted in the victim's death. He savagely beat Sadler to death. Because the evidence presented at trial did not raise a material issue as to whether defendant acted without malice, the trial court was not obliged, on its own initiative, to instruct the jury on involuntary manslaughter as to [the victim]." (*Cook, supra,* 39 Cal.4th at pp. 596–597.)

In *People v. Guillen* (2014) 227 Cal.App.4th 934 (*Guillen*), five inmates were convicted of second degree murder for a group beating of another inmate, Chamberlain, because they believed he was a child molester. The defendants hit, kicked, and stomped Chamberlain. He suffered blunt force trauma to every part of his body, particularly his face and scalp, his ribs were fractured and misplaced, and he suffered significant internal injuries. (*Id.* at pp. 943, 950–952, 959.) On appeal, four of the defendants argued the court should have instructed the jury on involuntary manslaughter based on their commission of a noninherently dangerous felony, assault with force likely to cause great bodily injury, and that there was evidence they acted with criminal negligence. (*Id.* at p. 1026.)

Guillen rejected defendants' argument that involuntary manslaughter instructions should have been given: "The parties spend much time addressing the issue of whether assault with force likely to produce great bodily injury is a noninherently dangerous felony justifying an involuntary manslaughter instruction …. But we conclude there is a more basic reason the trial court did not err in failing to instruct the jury sua sponte on involuntary manslaughter based on a noninherently dangerous felony—sufficient evidence did not warrant such an instruction." (*Guillen, supra,* 227 Cal.App.4th at p. 1027.)

> "Here, the record is devoid of evidence from which a reasonable jury could conclude [defendants] were guilty of involuntary manslaughter on the theory they were criminally negligent. The evidence detailed above demonstrates each [defendant] committed an act endangering Chamberlain's life, i.e., each [defendant] participated in the assault by hitting, kicking, or stomping Chamberlain. Additionally, there was evidence each [defendant] realized the danger and acted in total disregard

> of that danger. There was evidence each [defendant] participated in or was sufficiently aware of the CAR system [a racially-based hierarchy of inmates] and that child molesters were despised in jail and there were no rules for taxing [inmate-inflicted discipline] child molesters. Based on the record before us, there is no question each [defendant] knew the risk involved to Chamberlain when they violently attacked him." (*Id.* at pp. 1027–1028, 946–947.)

Guillen concluded that if the defendants were guilty, they were guilty of the greater offense of second degree murder and not the lesser included offense of involuntary manslaughter. (*Id.* at p. 1028.)

In *People v. Brothers* (2015) 236 Cal.App.4th 24 (*Brothers*), defendant believed the victim, who lived in her converted garage, had sexually molested her grandchildren. The victim denied defendant's accusations, but defendant did not believe him. Defendant beat the victim and hit him in the head multiple times with a broomstick with such force that it broke in half. Defendant and two friends tied up the victim, took him into the garage, and continued to beat his face and body. One of defendant's friends shoved a cloth gag down the victim's throat. The victim's body was later found on the side of a freeway. He died from blunt force trauma and asphyxiation due to airway obstruction. Defendant was charged with murder but convicted of the lesser included offense of voluntary manslaughter. (*Id.* at pp. 26–28.)

Brothers rejected defendant's argument that the court should have instructed the jury on involuntary manslaughter as another lesser included offense of murder. Defendant claimed the instruction was supported by her testimony that she did not know what was going to happen. (*Brothers, supra*, 236 Cal.App.4th at p. 34.)

> "Even crediting [defendant's] testimony in its entirety, there was simply no evidence from which a reasonable juror could entertain a reasonable doubt that [defendant] had acted in conscious disregard of the risk her conduct posed to [the victim's] life. [Defendant's] own account unequivocally established she engaged in a deliberate and deadly assault because she had been enraged, 'out of control,' and unable to calm herself. She admittedly beat [defendant] repeatedly on the head and face with the large wooden broom handle with great force, causing blunt force trauma the deputy coroner testified was a contributing cause of death. She also continued to

> beat [defendant] in the garage, as did [her two accomplices], leaving the scene only after [one accomplice] had forced the large cloth gag down [the victim's] throat and [the victim] had stopped moving. [Defendant] acknowledged that, at that point, she did not know whether [the victim] was alive or dead. There was no evidence of an accidental killing, gross negligence or [defendant's] own lack of subjective understanding of the risk to [the victim's] life that her and her confederates' conduct posed. On this record, the trial court had no sua sponte duty to instruct the jury on involuntary manslaughter." (*Id.* at p. 34.)

Brothers further explained that "when the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault. [Citations.] However, when, as here, the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter. [Citations.] Otherwise, an involuntary manslaughter instruction would be required in every implied malice case regardless of the evidence. We do not believe that is what the Supreme Court intended…." (*Brothers, supra*, 236 Cal.App.4th at p. 35.)

C. <u>Analysis</u>

The court in this case properly denied defendant's motion for the involuntary manslaughter instruction because it was not supported by substantial evidence. As explained above, defendant initially testified that he did not intend to kill Haag, but also testified about how he intentionally inflicted each blow, that he put his entire weight and force behind the punches and kicks to Haag's head and body, he continued to beat Haag after he fell down and admitted that he inflicted every injury described by the pathologist.

Defendant's own testimony established that he inflicted multiple severe blows to Haag's head that resulted in subarachnoid hemorrhages on both sides of the brain and

caused swelling in the brain; and blows to Haag's body that fractured his ribs and triggered internal bleeding in his chest.

There was undisputed evidence that defendant continued to beat Haag even though he was extremely vulnerable. Defendant admitted Haag never fought back or threw a punch at him, and defendant continued to beat and stomp Haag after he fell down. Ms. Paul and Ms. Tappe testified that when they arrived in Haag's bedroom, defendant stood over Haag's prone body and continued to beat him, and Haag made gurgling sounds as defendant delivered the final blows.

Defendant ignored Ms. Paul's pleas to stop beating Haag, and instead threatened to turn on her if she did not leave the bedroom. Defendant only stopped the beating when he realized his roommates had called 911 and cursed them as he fled.

The undisputed evidence showed that defendant inflicted a savage beating upon Haag, and there was no substantial evidence to support an instruction based on involuntary manslaughter. As in *Cook*, defendant "did not simply start a fistfight in which an unlucky blow resulted in the victim's death," but instead "savagely beat [Haag] to death." (*Cook, supra,* 39 Cal.4th at pp. 596–597.) There was "simply no evidence from which a reasonable juror could entertain a reasonable doubt that [defendant] had acted in conscious disregard of the risk [his] conduct posed to [the victim's] life. [Defendant's] own account unequivocally established [he] engaged in a deliberate and deadly assault" on Haag, based on his alleged anger that Haag may have molested his daughter. (*Brothers, supra,* 236 Cal.App.4th at p. 34.)

D. <u>Prejudice</u>

"[T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. … [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the

error affected the outcome." (*Breverman, supra,* 19 Cal.4th at p. 165, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

The review under *Watson* "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless." (*Breverman, supra,* 19 Cal.4th at pp. 177–178.)

Even if the court should have given an instruction on involuntary manslaughter, any possible error was not prejudicial. Defendant's own testimony established that he intentionally inflicted a severe beating upon a helpless and unresponsive victim, he was aware of the force he was using against him and continued to punch and kick him until he realized that law enforcement officers were on their way to the trailer.

III. Cumulative error

Defendant argues the cumulative effect of the two instructional errors rendered his trial fundamentally unfair. Having rejected his instructional contentions, we similarly reject his claim of cumulative error.

IV. The court's findings on the prior strike conviction

After defendant was convicted of voluntary manslaughter, defense counsel waived a jury trial on the prior conviction allegations. The court reviewed the People's documentary exhibits and found defendant's prior conviction for violating section 245,

subdivision (a)(1) was for assault with a deadly weapon, and that it was a serious felony and a strike conviction. The court imposed the second strike term of 17 years.

Defendant contends the court's finding that his prior assault conviction was based on his use of a deadly weapon, and was a serious felony and a strike, must be reversed because the trial court improperly made factual findings in violation of his Sixth Amendment right to a jury trial, as provided in a series of cases from the United States and California Supreme Courts. Defendant argues the matter must be remanded for another trial on the truth of the prior conviction allegations.

When the parties originally briefed this issue, they noted that the question was pending before the California Supreme Court as to the extent of a trial court's ability to make factual findings on prior conviction allegations.

The court has since issued its opinion in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) that addressed many of defendant's contentions. Defendant notified this court about the *Gallardo* decision, and we requested supplemental briefing from both parties about the impact of *Gallardo* on defendant's contentions.

A. Background

The amended information alleged defendant had one prior strike conviction (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(e)), one prior serious felony conviction enhancement (§ 667, subd. (a)), and one prior prison term enhancement (§ 667.5, subd. (b)). The amended information further alleged these allegations were based on defendant's conviction in 2009 in the Superior Court of Ventura County, case No. 200912755, for a violation of section 245, subdivision (a)(1).[15]

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[15] The amended information also alleged defendant had a second prior prison term enhancement based on his conviction in 2013 for possession of a controlled substance in violation of Health and Safety Code section 11350. (§ 667.5, subd. (b).) The court initially found this allegation true. Defendant later moved to strike the enhancement because the Superior Court of Ventura County had reduced the conviction to a misdemeanor under Proposition 47. The court granted defendant's motion and dismissed the enhancement that was based on the 2013 conviction.

At the time of defendant's prior conviction, section 245, subdivision (a)(1) made it "a felony offense to 'commit[] an assault upon the person of another with a deadly weapon or instrument other than a firearm *or* by any means of force likely to produce great bodily injury.' [Citation.] [¶] '[A]ssault with a deadly weapon' is a serious felony. [Citation.] On the other hand, while serious felonies include all those 'in which the defendant *personally inflicts* great bodily injury on any person' [citation], assault merely by *means likely to produce* GBI, without the additional element of personal infliction, is not included in the list of serious felonies. Hence, as the parties acknowledge, a conviction under the deadly weapon prong of section 245(a)(1) is a serious felony, but a conviction under the GBI prong is not." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*); *Gallardo, supra,* 4 Cal.5th at p. 125.)[16]

It was thus the People's burden to prove defendant's prior conviction for violating section 245, subdivision (a)(1) was for assault with a deadly weapon for the offense to constitute a serious felony and a strike. (*Gallardo, supra,* 4 Cal.5th at p. 125.)

B. <u>Bifurcation and defense counsel's waiver of a jury trial</u>

Prior to defendant's jury trial, the court granted the defense motion to bifurcate the prior conviction allegations.

After the jury found defendant guilty of the lesser offense of voluntary manslaughter, the court thanked and discharged the jury for all purposes.

Immediately after discharging the jury, the court turned to the matter of the prior conviction allegations and stated:

> "Defense counsel … has informed me if there was a guilty verdict on the underlying case, that there would be a Court trial."

Defense counsel did not object and the court conducted the bench trial.

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16 Effective January 1, 2012, the Legislature amended section 245 "to separate the prohibitions against assault 'with a deadly weapon' and assault 'by any means of force likely to produce great bodily injury' into different subdivisions." (*Gallardo, supra,* 4 Cal.5th at p. 125, fn. 1.)

C. The People's exhibits

At the bench trial, the prosecutor moved into evidence the section 969(b) certified documents of defendant's prior convictions. Defendant did not object or introduce any evidence, and the parties submitted the matter.

The People's exhibits included the abstract of judgment for defendant's assault conviction in Ventura County. According to the abstract, defendant committed the offense in 2008. The abstract further stated that defendant was convicted by a jury on May 1, 2009, of one felony count of "PC" section "245(a)(1)," described as "Assault with deadly weapon." On May 5, 2010, he was sentenced to two years in prison.

The exhibits also included a document from the Department of Justice's "Criminal Justice Information Services Division" (CJIS), that stated defendant was convicted in Ventura County of a felony violation of "245(A) (1)," of "FORCE/ADW NOT FIREARM: GBI," and he was sentenced to two years in prison.

D. The court's findings

The court stated that it reviewed the People's exhibits and found defendant had a prior conviction for assault with a deadly weapon in 2009, in violation of section 245, subdivision (a)(1). The court found true all the allegations based on the assault conviction, including that it was a prior strike conviction.

At the sentencing hearing, the court denied defendant's request to dismiss the prior strike conviction and imposed the second strike term of 17 years.

E. Assault with a deadly weapon

As explained above, the People have the burden of proving that a prior conviction for violating former section 245, subdivision (a) was for assault with a deadly weapon, for that conviction to constitute a serious felony and a strike. A violation of section 245, subdivision (a) based on assault with force likely to produce great bodily injury does not constitute a serious felony and a strike. (*Gallardo, supra,* 4 Cal.5th at pp. 123, 125.)

A defendant has a statutory right to a jury trial to " 'determine only whether [the defendant] "suffered" the alleged prior conviction' " (*People v. Epps* (2001) 25 Cal.4th 19, 23), not the legal effect of that conviction, such as whether the prior conviction constituted a strike (*People v. Kelii* (1999) 21 Cal.4th 452, 455–456) or whether the prior conviction is subject to the five-year serious felony enhancement under section 667, subdivision (a) (*People v. Williams* (2002) 99 Cal.App.4th 696, 700–701). Instead, these legal questions "are matters to be determined by the court." (*Id.* at pp. 700–701; *Gallardo, supra,* 4 Cal.5th at pp. 125, 138–139.)

In this case, the abstract of judgment stated that defendant's prior conviction resulted from a jury trial. However, the People did not introduce the records from that trial, such as the charging document, any testimonial evidence, or the verdict forms.

Instead, the court herein relied on the People's evidence, consisting of the abstract of judgment and the FBI's CJIS report, to find that defendant's violation of section 245, subdivision (a)(1) was for assault with a deadly weapon and constituted a serious felony and a strike.

Defendant asserts the trial court's factual finding on the underlying nature of his prior assault conviction violated his right to a jury trial as set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and subsequent cases from the United States and California Supreme Courts.

F. *Apprendi* and *McGee*

It had long been established in California that a sentencing court could determine whether a prior conviction was a serious felony and/or a strike based on reviewing the defendant's entire record of conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) When the prior conviction was based on a plea, the court could examine the record of conviction to determine whether the crime "realistically may have been based on conduct" that qualified as a strike and a serious felony. (*People v. McGee* (2006) 38 Cal.4th 682, 706 (*McGee*).)

Apprendi held that under the Sixth Amendment to the United States Constitution, any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490.)

In *McGee,* the California Supreme Court held that even after the ruling in *Apprendi,* a defendant did not have a federal constitutional right to a jury determination as to whether a prior conviction qualified as a serious felony: "*Apprendi* does not preclude a court from making sentencing determinations related to a defendant's recidivism." (*McGee, supra,* 38 Cal.4th at p. 707.) *McGee* held that whether the nature of the prior conviction met the requirements for a strike was a matter to be determined by the trial court, even if the court was required to determine facts underlying the prior conviction. (*Id.* at pp. 706–708.) "If the enumeration of the elements of the offense does not resolve the issue [of whether defendant suffered a qualifying conviction], an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*Id.* at p. 706.)

McGee further held that "the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. ... The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*McGee, supra,* 38 Cal.4th at p. 706.)

In reaching this holding, *McGee* recognized that the United States Supreme Court had not addressed this specific issue and it was thus reluctant, "in the absence of a more

definitive ruling on this point by the United States Supreme Court, to overturn the current California statutory provisions and judicial precedent that assign to the trial court the role of examining the record of a prior criminal proceeding to determine whether the ensuing conviction constitutes a qualifying prior conviction under the applicable California sentencing statute." (*McGee, supra,* 38 Cal.4th at p. 686.)

McGee acknowledged that the "continued examination of the scope of the rule announced in *Apprendi*—then still a relatively recent development in the high court's jurisprudence—might one day call for reconsideration of this approach." (*Gallardo, supra,* 4 Cal.5th at p. 124.)

G. *Gallardo*

As anticipated by *McGee,* the United States Supreme Court subsequently returned to *Apprendi*'s impact on this issue in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 579 U.S. __ [136 S.Ct. 2243] (*Mathis*).

And as also anticipated, the California Supreme Court reconsidered its position in light of *Descamps* and *Mathis,* and overruled *McGee* in *Gallardo, supra,* 4 Cal.5th 120.

In *Gallardo,* the defendant was alleged to have a prior serious felony conviction based on her plea for violating former section 245, subdivision (a). As in this case, the statute could be violated by committing assault either with a "deadly weapon" or "by any means of force likely to produce great bodily injury." (*Gallardo, supra,* 4 Cal.5th at p. 136.)

The trial court in *Gallardo* reviewed the preliminary hearing transcript from defendant's prior case, consistent with *McGee,* and found she used a deadly weapon and the prior assault conviction was a serious felony. However, there was nothing in the record to show the defendant adopted the preliminary hearing testimony as the factual basis when she entered her plea to the assault charge. (*Gallardo, supra,* 4 Cal.5th at pp. 125–126, 136.)

Potential forfeiture of constitutional issue

On appeal, the defendant in *Gallardo* argued the court's reliance on the preliminary hearing transcript from the prior case violated her Sixth Amendment rights, as set forth in *Apprendi, Descamps,* and *Mathis*. (*Gallardo, supra,* 4 Cal.5th at p. 124.)

As a threshold matter, *Gallardo* first noted that defendant had waived her right to a jury trial on the prior conviction allegation and not raised any constitutional objections. *Gallardo* held that defendant's waiver was "most naturally understood as a waiver of the limited statutory right to have a jury decide whether she had suffered the prior assault conviction. It is not reasonably understood as a waiver of any constitutional right to have a jury make the findings necessary to determine whether her prior conviction was a serious felony, much less as an abandonment" of her constitutional arguments under *Apprendi* and *Descamps*. (*Gallardo, supra,* 4 Cal.5th at p. 127.)

Gallardo acknowledged that as a separate matter, defendant might have forfeited her Sixth Amendment challenge by failing to raise it in the trial court. "[A]t the time defendant was sentenced, California law allowed a trial court to look to a preliminary hearing transcript to determine whether a defendant's prior conviction was 'realistically' a serious felony. To be sure, *Descamps,* which forms the centerpiece of defendant's argument to this court, had been decided by the time of defendant's sentencing. But *Descamps* did not squarely overrule existing California law; it discussed the relevant Sixth Amendment principles only en route to construing the federal statute at issue to avoid constitutional concerns. [Citation.] It is at least questionable whether defendant should be made to bear the burden of anticipating potential changes in the law based on the reasoning of a United States Supreme Court opinion addressed to the proper interpretation of a federal statute not at issue here." (*Gallardo, supra,* 4 Cal.5th at pp. 127–128.) *Gallardo* declined to address that question since the People had not raised forfeiture. (*Id.* at p. 127.)

The trial court's record review

Gallardo disapproved *McGee* and held the trial court had violated the defendant's Sixth Amendment right to a jury trial "when it found a disputed fact about the conduct underlying defendant's assault conviction that had not been established by virtue of the conviction itself." (*Gallardo, supra,* 4 Cal.5th at pp. 124–125.)

> "[T]he approach sanctioned in *McGee* is no longer tenable insofar as it authorizes trial courts to make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction. The trial court's role is limited to determining the facts that were necessarily found in the course of entering the conviction. To do more is to engage in 'judicial factfinding that goes far beyond the recognition of a prior conviction.' " (*Id.* at p. 134.)

Gallardo found the United States Supreme Court had made it clear in *Mathis* and *Descamps* "that when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.' [Citation.] While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo, supra,* 4 Cal.5th at p. 124.)

> "[W]e now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Gallardo, supra,* 4 Cal.5th at p. 136, fn. omitted.)

Gallardo held the trial court had engaged in "a form of factfinding" that violated the Sixth Amendment by relying on the preliminary hearing transcript to determine the nature of the defendant's prior assault plea, even though there was no evidence the defendant had adopted the preliminary hearing testimony for the factual basis to her plea. (*Gallardo, supra,* 4 Cal.5th at p. 136.)

In reaching this holding, *Gallardo* noted that a trial court could rely on "certain documents to identify the precise statutory basis for a prior conviction," such as "indictments and jury instructions" that "might help identity what facts a jury necessarily found in the prior proceeding." (*Gallardo, supra,* 4 Cal.5th at p. 137, citing *Descamps, supra,* 570 U.S. at p. 257.)

> "But defendant's preliminary hearing transcript can reveal no such thing. A sentencing court reviewing that preliminary transcript has no way of knowing whether a jury would have credited the victim's testimony had the case gone to trial. And at least in the absence of any pertinent admissions, the sentencing court can only guess at whether, by pleading guilty to a violation of … section 245, subdivision (a)(1), defendant was also acknowledging the truth of the testimony indicating that she had committed the assault with a knife." (*Gallardo, supra,* 4 Cal.5th at p. 137.)

Gallardo held the trial court had engaged in "an impermissible inquiry to determine" the factual basis for the defendant's prior plea by relying on the preliminary hearing transcript, since "the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea" and could not serve as the basis for the defendant's increased sentence. (*Gallardo, supra,* 4 Cal.5th at p. 137.)

Remand for further court findings

Gallardo remanded the matter for the trial court to make the relevant determinations about what facts the defendant admitted in entering her plea, and to permit "the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant's guilty plea encompassed a relevant admission about the nature of her crime." (*Gallardo, supra,* 4 Cal.5th at p. 139.)

Gallardo did not find that the defendant was entitled to a new jury trial as to whether her prior conviction was for assault with a deadly weapon and a serious felony. "While a trial court can determine the fact of a prior conviction without infringing on the defendant's Sixth Amendment rights, it cannot determine disputed facts about what conduct likely gave rise to the conviction. This is a development the parties apparently did not anticipate at the time this case was tried." (*Gallardo, supra,* 4 Cal.5th at p. 138.)

Instead, *Gallardo* reaffirmed prior precedent that "instructs that determinations about the nature of prior convictions are to be made by the court, rather than a jury, based on the record of conviction. [Citation.] We have explained that the purpose of the latter limitation is to avoid forcing the parties to relitigate long-ago events, threatening defendants with 'harm akin to double jeopardy and denial of speedy trial.' " (*Gallardo, supra,* 4 Cal.5th at p. 138.)

> "[S]uch a proceeding—in which a jury would be impaneled for the sole purpose of reading the preliminary hearing transcript in defendant's prior assault case—would raise significant constitutional concerns under *Apprendi*. The basic rationale of *Apprendi* is that facts that are used to increase the defendant's maximum possible sentence are the functional equivalent of elements of the offense, and they must be proved in the same way: i.e., at a trial before a jury, and beyond a reasonable doubt. [Citation.] To permit a jury to make factual findings based solely on its review of hearsay statements made in a preliminary hearing would be to permit facts about the defendant's prior conviction to be proved in a way that no other elemental fact is proved—that is, without the procedural safeguards, such as the Sixth Amendment right to cross-examine one's accusers, that normally apply in criminal proceedings. This kind of proceeding might involve a jury, but it would not be much of a trial." (*Gallardo, supra,* 4 Cal.5th at pp. 138–139, fn. omitted.)[17]

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17 In a concurring and dissenting opinion, Justice Chin agreed the court's factual findings violated defendant's right to a jury finding but wrote that he would remand the matter for a new jury determination about whether the defendant's prior conviction was a serious felony. "The proper remedy for a violation of defendant's jury trial right is to give her that jury trial." (*Gallardo, supra,* 4 Cal.5th at p. 140 (conc. & dis. opn. of Chin. J.).)

H. Analysis: Defense counsel's waiver of a jury trial on the prior conviction

We now turn to defendant's issues about his prior assault conviction and whether it was a serious felony.

We begin with defendant's contentions about the impact of defense counsel's waiver of a jury trial on the truth of the prior conviction allegations. Defendant acknowledges that counsel's waiver was sufficient to waive his *statutory right* to a jury trial on the prior conviction allegations. (See, e.g., *People v. Vera* (1997) 15 Cal.4th 269, 277–278, overruled on other grounds in *People v. French* (2008) 43 Cal.4th 36, 46–47.)

However, defendant asserts counsel's wavier was insufficient to waive his *federal constitutional right* to a jury trial on the nature of the prior assault conviction in the absence of his own personal waiver of that right. As in *Gallardo*, defendant's waiver of a jury trial in this case only addressed his "limited statutory right to have a jury decide whether [he] had suffered the prior assault conviction. It is not reasonably understood as a waiver of any constitutional right to have a jury make the findings necessary to determine whether [his] prior conviction was a serious felony, much less as an abandonment" of his constitutional arguments under *Apprendi*, *Descamps*, and *Mathis*. (*Gallardo, supra,* 4 Cal.5th at p. 127.)

In addition, it would be "at least questionable" to find that defendant in this case had the burden of "anticipating potential changes in the law based on the reasoning of a United States Supreme Court opinion addressed to the proper interpretation of a federal statute not at issue here." (*Gallardo, supra,* 4 Cal.5th at pp. 127–128.)

We thus agree that defense counsel's waiver did not amount to a waiver of the constitutional issues raised in this appeal.

I. Analysis: Jury trial on the nature of the prior conviction

To the extent defendant may argue that he is entitled to a new jury trial on the nature of his prior assault conviction, and whether that prior conviction is a serious felony and a strike, that question has also been decided by *Gallardo*.

Gallardo did not reassign the task of reviewing the record of conviction to a jury to find the nature of the prior conviction allegation. Instead, *Gallardo* reaffirmed previous cases and held that determinations about the nature of the prior conviction "are to be made by the court, rather than a jury, based on the record of conviction. [Citation.]" (*Gallardo, supra,* 4 Cal.5th at p. 138.) While Justice Chin disagreed with this point in his concurrence, the majority rejected his call for a new jury determination about the nature of the prior conviction.

J. Analysis: CJIS Report

Defendant argues the court's reliance on the Department of Justice's CJIS report was improper under *Gallardo* to determine the nature of his prior conviction. The People agree.

As defined by *Gallardo*, the CJIS report is outside the record of conviction since it appears to be a register of actions. The trial court in this case would have improperly engaged in factfinding in violation of *Apprendi* and *Gallardo* by drawing any inferences from this document to find the nature of defendant's prior assault conviction.

K. Analysis: Abstract of judgment and *Delgado*

The People also introduced the abstract of judgment from defendant's prior conviction. It stated that after a jury trial, defendant was convicted of "Assault with deadly weapon" in 2009, in violation of section "245(a)(1)."

In *Delgado, supra,* 43 Cal.4th 1059, a case decided after *McGee* and before *Gallardo*, the California Supreme Court affirmed a trial court's finding of a prior strike based on an abstract of judgment that "specified the statute violated as '245(A)(1)' and described the crime as 'Asslt w DWpn.' " (*Delgado*, at p. 1063.) *Delgado* held the Eppsnotation "clearly described only one of the two means by which the statute can be violated," and that the trial court "was not required to assume the descriptive language was mere surplusage." (*Id*. at p. 1071.)

Delgado held that an abstract of judgment is an "officially prepared clerical *record* of the conviction and sentence." (*Delgado, supra,* 43 Cal.4th at p. 1070.) In the absence of rebuttal evidence, an "officially prepared abstract of judgment that clearly describes the nature of the prior conviction" is presumed reliable and accurate. (*Id*. at pp. 1070–1071.) *Delgado* held that if the abstract describes a qualifying offense under the three strikes law, it constitutes prima facie evidence that a qualifying conviction occurred. (*Id*. at pp. 1066, 1070.)

Gallardo did not address *Delgado,* and it has not been overruled.

L. Conclusion: The record in this case

The trial court erroneously relied on the CJIS document to determine the nature of defendant's assault conviction since that document is clearly not part of the record of conviction. However, the error is harmless because the People also introduced the abstract of judgment. It states without equivocation that defendant's prior conviction was for assault with a deadly weapon, and that specific description supports the trial court's finding that defendant's assault conviction was a serious felony and a strike.[18]

V. The prior serious felony enhancement

Defendant was sentenced to 17 years based on the midterm of six years for voluntary manslaughter, doubled to 12 years as the second strike term; plus a consecutive term of five years for the section 667, subdivision (a) prior serious felony enhancement.

At the time of the sentencing hearing, the court was statutorily required to impose the section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

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[18] Defendant asserts the accuracy of the abstract of judgment was rebutted by the CJIS report because it stated that defendant was convicted of "Force/ADW Not Firearm: GBI." However, the CJIS report was inadmissible under *Gallardo,* it should have been excluded by the trial court, and it cannot be relied upon to rebut the accuracy of the abstract. We further note that defendant was convicted after a jury trial, and defendant did not introduce any exhibits from that jury trial to refute the statement in the abstract of judgment.

Defendant contends the matter must be remanded for resentencing to give the superior court the opportunity to consider whether to dismiss the section 667, subdivision (a) prior serious felony enhancement in furtherance of justice, pursuant to the recent amendments to section 667 and section 1385 enacted by Senate Bill No. 1393, effective January 1, 2019, which removed the prohibitions on striking a prior serious felony enhancement. (Stats. 2018, ch. 1013, §§ 1, 2.) The People concede the amendments apply and remand is required since defendant's case is not yet final.

By remanding the matter, we do not find that the court must strike the enhancement, but only that the court must consider whether to exercise its discretion in furtherance of justice pursuant to the newly-enacted statutory provisions.

DISPOSITION

The matter is remanded for the superior court to consider striking defendant's prior serious felony enhancement (§ 667, subd. (a)). The judgment is otherwise affirmed.

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HILL, P.J.

WE CONCUR:

_____
POOCHIGIAN, J.

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MEEHAN, J.